among the producing elements, and if interference in that division shows a readjustment of rates to be necessary, to grant such. Only an understanding and regulation of the fair demands of the elements working the railroads can enable Congress to determine what the railroads should receive for their commodity. The power now assumed by Congress is therefore a condition precedent to the fair exercise of the power to regulate rates. It is the rescue of the railroads from their impossible position between the upper and nether millstones — a dilemma long familiar to the public mind.

But Congress has intrusted one millstone to the Interstate Commerce Commission. If it retains the other one itself the grinding may go on. It cannot be questioned that if the combination prevents the roads from earning a fair income, power has been exceeded somewhere.[13] But is it the raising of the wage by Congress, or a supposed refusal to raise rates by the Commission, that is unconstitutional? Presumably the latter. Where safety appliances are prescribed by statute, the assumption apparently has been that they must be applied regardless of cost,[14] and the rates advanced if necessary. So probably of wages. The confiscation indeed does not happen until the last remedy has been exhausted, *i.e.*, until an advance has been refused. Of course, the reliance of the Commission on Congress for existence, and the probability that finally the wage question too will be left in the hands of the Commission, make highly improbable any such clash as that supposed.

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THE CASE OF *THE ZAMORA*. — The decision of the Privy Council in the case of *The Zamora* [1] does not justify the excitement which it caused in contemporary newspapers. It does not hold that Order XXIX, Rule I, of the English Prize Court Rules, which is repugnant to the law of nations as recognised by England and administered in English courts, is invalid because of any dominant quality of the law of nations, but because the Order in question was made without authority.

The case arose from the desire of the English war authorities, at a time of moderate necessity, to use part of the cargo of a neutral ship held by the prize court, pending suit for condemnation as contraband. The King in Council, in contravention of international law,[2] amended the Prize Court Rules so as to require the prize court to allow such action, but the Privy Council refused to countenance the alteration.

The sole question was the authority of the King in Council to enact the law. This might arise from either of two sources, the Royal Prerogative, or Parliamentary delegation. The Prize Court Act, 1894, is the only Parliamentary grant at all applicable to the case. That simply permitted the Executive to regulate the procedure and practice of the court. There

[13] *Cf.* Smyth *v.* Ames, 169 U. S. 466.

[14] Baltimore & Ohio R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612; New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628.

[1] 32 T. L. R. 436.

[2] "International law" is used throughout the text to mean the body of rules formulated by the nations of the world to govern their relations *inter se*, as those rules are recognized by an individual sovereign and administered by its courts.

was no authority therefore from this source to make an order changing the rules of substantive law upon which the court based its decisions. Nor could such an order as the one in question issue by virtue of the Prerogative, which, though it has tended to expand of late, has not for centuries been a source of change in the rules of law that courts administer.[3] That it was international law which the Executive here sought to change cannot produce a different result. The order therefore which alone could sustain the contention of the Crown was unauthorized and void; and the Privy Council so found. Unfortunately for popular interpretation, the language of the court is in many passages misleading, apparently invoking some inherent superiority of international law to add sanction to the holding.

There are some *dicta* in several of the older cases,[4] notably by Lord Stowell, that seem to insist that when international law conflicts with a direct enactment of the legislature, the former should be followed by the court. This doctrine has much support from the older text writers,[5] who apparently reach their conclusion by the easy method of confusing wish with power. Such a view is clearly without analytical foundation. The rules formulated by the nations of the world to govern their relations *inter se* live as actual laws, at any rate at present, only through their recognition and adoption by individual municipalities. A prize court is today a municipal court, administering these rules to the extent that it is authorized to do so. Its administration of the rules rests upon such authorization and tacit or expressed recognition of them by the sovereign, and when this recognition ceases in whole or in part, to that extent the court must cease to administer the rules. Modern authority supports this view.[6]

However, though the law as to direct legislative acts is settled, the attitude of the English courts toward Orders in Council is less clear. In many of the older cases and texts a greater emphasis is laid on the dominant quality of international law when the conflict is with an Order in Council than when it is with a direct legislative act.[7] When the Order in question is one resting solely on Prerogative the difference is justified, for, as we have seen above, Prerogative can no more change the rules administered by prize courts than it can any other rules of law. It was with reference to this kind of an order that the court in the case of *The Zamora* used the language that has misled the newspapers. Perhaps a court in war time, making a decision on sound constitutional grounds,

[3] *Ipse autem rex, non debet esse sub homine, sed sub deo et sub lege, quia lex facit regem.* BRACTON, Bk. I, Ch. 8. See 12 Co. Rep. 63; 12 *id.*, 74.

[4] See The Maria, 1 C. Rob. 340; The Walsingham Packet, 2 C. Rob. 77; The Recovery, 6 C. Rob. 341; The Fox, Edw. Adm. 311; The Lucy, Edw. Adm. 122; The Ostsee, 9 Moore P. C. 150.

[5] 3 PHILLIMORE, INTERNATIONAL LAW, §§ 433–436; 2 HALLECK, INTERNATIONAL LAW, Ch. 32, § 19.

[6] Mortensen *v.* Peters, 14 Scot. L. T. 227. See The Zamora, 32 T. L. R. 436, 440; Regina *v.* Keyn, 2 Ex. Div. 63, 160; Maisonnaire *v.* Keating, 2 Gall. (U. S.) 325; The Amy Warwick, 2 Sprague 123, 130. WESTLAKE, INTERNATIONAL LAW, Part II, 318; 1 SCOTT, HAGUE PEACE CONFERENCES OF 1899 & 1907, 466 *et seq.*; W. E. Wilkinson, "The Law Administered by Prize Courts," 36 CAN. L. T. 530. But see TAYLOR, INTERNATIONAL PUBLIC LAW, § 32.

[7] See The Fox, Edw. Adm. 311; The Lucy, Edw. Adm. 122; 3 PHILLIMORE, 654–657.

but still one that pleases neutrals, may be forgiven if it draws a little of the holy sanction of the law of nations to its aid.

The same thing may explain the language of the early cases that we have spoken of. Until well into the last century "Order in Council" meant an Order by the King; the delegation of legislative power to His Majesty in Council is, in anything like its present prevalence, quite modern.[8] Faced with an order strictly by Prerogative, the older courts, like the Privy Council now, refused to follow it, and relied on the Law of Nations or the Law of Nature as one reason for their holding. It cannot be doubted that a modern court, faced with an Order in Council made under real legislative delegation of authority, would follow out the Order.

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PRICE MAINTENANCE AT COMMON LAW AND UNDER PROPOSED LEGISLATION.—A movement has long been on foot to secure to manufacturers of trade-marked articles the statutory right to fix by contract the prices at which their products shall pass through the channels of distribution down to the ultimate consumer.[1] The promoters of this legislation contend, and some cases support their view,[2] that such right exists on common law principles.[3] Whatever restraint is laid on competition among distributors by this policy they maintain is not injurious, but beneficial to the public, and necessary under modern methods of business to protect the quality of, and market for, the manufacturer's trade-marked product.[4] At first glance, the manufacturer's alignment with jobber and retailer to secure this legislation seems anomalous, for what profits distributors receive apparently should not concern him.[5] According to traditional economic theory, the smaller the retail price the larger the volume of sales, with correspondingly increased profits to the manufacturer. But practice finds the manufacturer allied with jobber and retailer for reasons psychological and pecuniary. By nature he is prone to support the existing system of distribution against the innovations of price-cutters, and moreover, he may believe that his valuable trade-mark loses on the cheap bargain counter respectability and prestige. To self-interest, however, he ascribes his position. Trade-marked or "identified" goods, it is asserted, are advertised by nation-wide campaigns conducted by their

[8] See MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 387 *et seq.*

[1] Stephens Bill, 64th Congr., 1st Sess. H. R. 13568.

[2] Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745; Park *v.* National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136; Fisher Flouring Mills Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144; Walsh *v.* Dwight, 40 App. Div. (N. Y.) 513; Commonwealth *v.* Grinstead, 111 Ky. 203, 63 S. W. 427; National Phonograph Co., Ltd. *v.* Edison-Bell Consolidated Phonograph Co., Ltd., [1908] 1 Ch. 335. See Report of Committee on Maintenance of Prices, 4th Annual Meeting, Chamber of Commerce of the United States. *Contra*, W. J. Shroder, "Price Restriction on the Re-Sale of Chattels," 25 HARV. L. REV. 59.

[3] See R. G. Brown, "The Right to Refuse to Sell," 25 YALE L. J., 194.

[4] See G. H. Montague, "Should the Manufacturer have the Right to Fix Selling Prices?" 63 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 55. W. H. Ingersoll, "The Answer to Macy's," PRINTER'S INK, May 6, 1915. E. S. Rogers, "Predatory Price Cutting as Unfair Trade," 27 HARV. L. REV. 139. Hearings on H. R. 13568, May 30 and June 1, 1916.

[5] F. W. Taussig, "Price-Maintenance," AM. EC. REV., Mar., 1916, p. 170.